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IN THE
SUPREME COURT OF THE UNITED STATES

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,
Petitioners,

v.

TOMMIE GRANVILLE,
Respondent.

On Writ of Certiorari To The Supreme Court of Washington

BRIEF *AMICI CURIAE* OF AARP AND GENERATIONS UNITED IN SUPPORT OF PETITIONERS

ROCHELLE BOBROFF*
BRUCE VIGNERY
AARP FOUNDATION LITIGATION

MICHAEL SCHUSTER
AARP
601 E Street, NW
Washington, DC 20049
(202) 434-2060
Attorneys for *Amici Curiae*
AARP and Generations United

*Counsel of Record

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BRIEF *AMICI CURIAE* OF AARP AND GENERATIONS UNITED IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*[1]

AARP is a nonprofit membership organization of more than 33 million persons age fifty and older dedicated to addressing the needs and interests of older Americans. Approximately seventy percent of older Americans are grandparents. AARP & The Roper Organization, *Mature America in the 1990s: A Special Report from Modern*

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[1] This brief has been authored in its entirety by undersigned counsel for the amici. No person or entity, other than the named amici and their counsel, made any monetary contribution to the preparation or submission of this brief.

Maturity Magazine and the Roper Organization, MODERN MATURITY, 1995, at 18-19. The AARP Grandparent Information Center, established in 1993, serves as a national resource center for grandparents who are raising their grandchildren. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all citizens.

Generations United (GU) is a nonprofit national membership organization that advocates for the mutual well being of children, youth, and the elderly. GU was founded by the Child Welfare League of America, the Children's Defense Fund, the National Council on the Aging, and AARP to forge a common agenda among advocates for both younger and older constituencies. GU's membership includes over 100 national, state and local organizations that represent more than 70 million Americans. GU's Grandparents and Other Relatives Raising Children Project educates policy makers and the public, trains individuals serving relative-headed families, and distributes educational publications. GU serves as a catalyst for collaboration among organizations representing older and younger Americans, providing a forum to explore areas of common ground while celebrating the richness of each generation.

By written consent of the parties,[2] *amici curiae* submit this brief in support of Petitioners.

SUMMARY OF THE ARGUMENT

The Court's decision in this case will reach far beyond the boundaries of the state of Washington. All fifty states have passed visitation statutes which, like Washington, permit grandparents to petition the courts for an order awarding visitation with their grandchild, when such visitation is in the best interest of the child. Grandparent visitation statutes have been enacted as a national response to increasing rates of

[2] Letters of consent from all parties have been filed separately with the Clerk of the Court.

parental drug use, teen pregnancy, divorce, single-parent households, crime, and child abuse. The legislative history of grandparent visitation statutes around the country is replete with examples of legislators and their constituents testifying about the need for such statutes to promote the well being of children who are facing challenges unprecedented in this nation's history.

Not a single state statute gives grandparents an automatic right to visit with their grandchild. Instead, all grandparent visitation statutes require judges to look carefully at the individual families before them and ascertain whether a particular child would benefit from visitation with the petitioning grandparent. The fifty states were unanimous in selecting the best interest of the child standard as the basis for determining whether to order visitation. *See* attached chart, Comparison of Grandparent Visitation Statutes Nationwide (Appendix A).[3]

The Supreme Court of Washington held that the best interest of the child standard is "insufficient" to, override the parents' right to family privacy under the United States Constitution. *In re Custody of Smith*, 969 P.2d 21, 30-31 (Wash. 1998)(en banc). This ruling misapplies the precedent of this Court. Because an award of visitation does not constitute a substantial infringement of parents' rights, grandparent visitation statutes based on the child's best interest are well within the ambit of constitutional state powers.

ARGUMENT

I. DEMOGRAPHIC CHANGES IN THE UNITED STATES LED TO THE PASSAGE OF GRANDPARENT VISITATION STATUTES IN FIFTY STATES

[3] This chart is based on *amici's* analysis of the statutes listed *infra* in note 20.

A. As Challenges Facing Families Increase, Grandparents are Playing a More Significant Role in the Rearing of Grandchildren.

Approximately 60 million Americans, comprising 31% of the United States population, are grandparents.[5/] Greater longevity has contributed to an increase in the number of grandparents in this country. In 1900, life expectancy in the United States was forty-six years. In 1985, life expectancy was more than seventy-three years for men and eighty years for women.[6/] In this century, the rate of growth of the elderly population greatly exceeded the growth rate of the population of the country as a whole, and people eighty-five years and older are the fastest growing segment of the elderly population.[7/] Contemporary grandparents are "healthier, more educated, and more affluent than any generation before them."[8/]

AARP's 1998 Grandparent Survey found that today's grandparents are very involved in their grandchildren's lives. Eighty-two percent of the grandparents surveyed reported that they had visited with a grandchild in the month preceding the survey. Forty-four percent stated that they usually see a grandchild at least once a week. Eighty-five percent reported that they had spoken with a grandchild on the telephone in the past month.[9/] Similarly, a grandparent survey by the Roper

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[5/] *The Grandparent Niche* (last modified Aug. 4, 1998) <http://www.roper.com/news/content/news52htm>.

[6/] ARTHUR KORNHABER, CONTEMPORARY GRANDPARENTING 10 (1996).

[7/] U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P23-194, *1997 Population Profile of the United States* 50 (Sept. 1998).

[8/] KORNHABER, *supra* note 5, at 11.

[9/] AARP Research Group, The 1998 Grandparenting Survey: The Sharing and Caring Between Mature Grandparents and Their Grandchildren 22-25, July 1999, AARP Washington, DC. These survey

Organization, reported in AARP's *Modern Maturity* magazine, found that in a typical month, a majority of grandparents have grandchildren over for dinner, over forty percent have grandchildren over to spend at least one night, twenty-five percent take a trip to visit their grandchildren, and two-thirds speak with their grandchildren over the telephone.[9/]

Grandparents are also an important provider of child care, especially for young children. In 1993, 17% of the nation's preschoolers, or almost 1.7 million young children, were cared for during the day by grandparents while their mothers worked.[10/]

Research demonstrates that grandparents contribute significantly to the healthy development of their grandchildren.[11/] For instance, children who have close relationships with their grandparents were found to be more emotionally secure than other children.[12/] Grandparents serve an important function as role models; children's relationships with their grandparents affect their relationships with their own grandchildren two generations later.[13/]

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results reflect the responses of 650 grandparents who were not living in the same household as their grandchildren.

[9/] AARP & The Roper Organization, *supra*, at 18-19.

[10/] Lynne M. Casper, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P70-53, *Who's Minding Our Preschoolers?* 1 (Mar. 1996).

[11/] Vincent K. Adkins, *Grandparents as a National Asset: A Brief Note*, 24(1) ACTIVITIES, ADAPTATION & AGING, 13-18 (1999).

[12/] Marie Purnell & Beatrice Bagby, *Grandparents' Rights Implications for Family Specialists*, 42 FAMILY RELATIONS 175 (April 1993), citing ARTHUR KORNHABER and K.L. WOODWARD, GRANDPARENTS/GRANDCHILDREN: THE VITAL CONNECTION (1981).

[13/] *Id.*, citing H.Q. Kivnick, *Grandparenthood: An overview of meaning and mental health*, 22 GERONTOLOGIST 59-66 (1982).

An increasing number of children, especially children under 6 years of age, are living with their grandparents. Approximately 4 million American children currently live with their grandparents in households where the grandparents own or rent the home. One million four hundred thousand children live in a household where neither parent is present and the grandparent assumes the role of primary caregiver. The number of grandparent caregivers has increased by 75% since 1970 (based on comparative census data from 1970 to 1997).[14]

The United States Department of Commerce, Current Population Reports, notes that the increase in the number of grandparent caregivers "has been attributed to the growth in drug use among parents, teen pregnancy, divorce, the rapid rise of single-parent households, mental and physical illness, AIDS, crime, child abuse and neglect, and incarceration of parents."[15] In 1994, the AARP Grandparent Information Center surveyed 479 grandparents raising grandchildren regarding the reasons for assuming parental responsibility. The reasons reported were substance abuse by parents (44%), child abuse or neglect (28%), teenage pregnancy or parents' failure to handle children (11%), death of a parent (5%), unemployment of a parent (4%), divorce (4%), and other reasons, including HIV/AIDS (4%).[16]

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[14] Terry A. Lugaila, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P20-514, *Marital Status and Living Arrangements: March 1998* (Update), at iii Table A (1998).

[15] Ken Bryson and Lynne M. Casper, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, P23-198, *Coresident Grandparents and Grandchildren* 1 (May 1999)(citing Meredith Minkler, *Intergenerational Households Headed by Grandparents: Demographic and Sociological Contexts*, in GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN: BACKGROUND PAPERS FROM GENERATIONS UNITED'S EXPERT SYMPOSIUMS (Generations United ed. 1998).

[16] Renee Woodworth, Grandparent-headed Households and their Grandchildren, Sept. 8, 1994, AARP Grandparent Information Center, Washington, DC.

While more children are living with grandparent caregivers, a decreasing number of children are living with two parents, even when stepparents and adoptive parents are included. The proportion of children living with two parents declined from 85% in 1970 to 68% in 1996, and the proportion of children living with one parent grew from 12% to 28%. Of these single parents, in 1996, 39% were divorced, 37% had never been married, 21% were separated from their spouse, and 4% were widowed.[17]

Grandchildren in single-parent families and step-families report being closer and more involved with their grandparents than grandchildren from families with two biological parents present.[18] Indeed, grandparents can be a stabilizing force for children whose parents have divorced or died.[19]

B. The Legislative History of Grandparent Visitation Statutes Nationwide Demonstrates that States Enacted These Statutes to Promote the Welfare of Children.

Prior to 1965, grandparents had no statutory right to visit with their grandchildren. From the mid-1960s through the end of the century, state legislatures have been troubled by the effect on children of the increasing rates of divorce, out-of-wedlock births, teen pregnancy, drugs, AIDS, and child abuse and neglect. In response to these concerns, all fifty state legislatures (but not the District of Columbia) enacted laws

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[17] U.S. DEP'T OF COMMERCE, *supra* note 6, at 27, 48.

[18] G.E. Kennedy & C.E. Kennedy, *Grandparents: A special resource for children in stepfamilies*, JOURNAL OF DIVORCE AND REMARRIAGE, 19, 45-68 (1993).

[19] Purnell & Bagby, *supra* note 12, at 175.

which promote grandparent visitation when found to be in the child's best interest.[20] These laws specify circumstances in

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[20] ALA. CODE §§ 26-10A-30, 30-34.1 (West, WESTLAW through 1999 Reg. Sess.); ALASKA STAT. §§ 25.20.065, 25.24.150 (Deering, LEXIS through 1998 2nd Spec. Sess.); ARIZ. REV. STAT. ANN. §§ 9-13-103, 25-409 (West, WESTLAW through 1999 1st Reg. Sess. and 1st & 2nd Spec. Sess.); ARK. CODE ANN. § 9-13-103 (West, WESTLAW through 1999 Reg. Sess.); CAL. FAM. CODE §§ 3102 to 3104 (West, WESTLAW through 1997-1998 Reg. Sess. and1st Ex. Sess.); COLO. REV. STAT. §§ 19-1-117, 19-1-117.5 (West, WESTLAW through 1999 1st Reg. Sess.); CONN. GEN. STAT. § 46b-59 (West, WESTLAW through Gen. St., Rev, to 1-1-99); DEL. CODE ANN. tit. 10 § 1031 (West, WESTLAW through 1998 Reg. Sess.); FLA. STAT. ANN. §§ 752.01, 752.07 (West, WESTLAW through 1998 2nd Reg. Sess.); GA. CODE ANN. § 19-7-3 (West, WESTLAW through 1999 General Assembly); HAW. REV. STAT. §§ 571-46, 571-46.3 (West, WESTLAW through 1999 Act 201); IDAHO CODE § 32-719 (Deering, LEXIS through 1999 Reg. Sess.); ILL. COMP. STAT. §§ 5/607, 5/11-7.1 (West, WESTLAW through 1999 Act 5); IND. CODE §§ 31-17-5-1, 31-17-5-2, 31-17-5-9 (West, WESTLAW through 1999 1st Reg. Sess.); IOWA CODE § 598.35 (West, WESTLAW 8/18/1999 amendments received); KAN. STAT. ANN. § 38-120 (West, WESTLAW through 1998 Reg. Sess.); KY. REV. STAT. ANN. § 405.021 (West, WESTLAW through 1998 Reg. Sess.); LA.. REV. STAT. ANN. §§ 9:344, Ch. C. Art. 1264 (West, WESTLAW through 1998 1st Ex. Sess. and Reg. Sess. Acts); ME. REV. STAT. ANN. tit. 19-A, §§ 1801-1804 (West, WESTLAW through 1997 2nd Spec. Sess); MD. CODE ANN., FAM. LAW § 9-102 (West, WESTLAW through 1998 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 119 § 39D (West, WESTLAW through 1999 1st Annual Sess.); MICH. COMP. LAWS ANN. § 722.27b (West, WESTLAW through 1999 Regular Sess.); MINN. STAT. ANN. § 257.022 (West, WESTLAW through 1998 1st Spec. Sess.); MISS. CODE ANN. §§ 93-16-1, 93-16-3, 93-16-5, 93-16-7 (West, WESTLAW through 1999 Reg. Sess.); MO. ANN. STAT. § 452.402 (West, WESTLAW through 1998 2nd Reg. Sess.); MONT. CODE ANN. §§ 40-9-101, 40-9-102 (West, WESTLAW through 1997 Reg. Sess.) ; NEB. REV. STAT. §§ 43-1801 to 43-1803 (West, WESTLAW through 1998 1st Spec. Sess.); NEV. REV. STAT. ANN. § 125A.330 (West, WESTLAW through 1997 Reg. Sess.); N.H. REV. STAT. ANN. § 458:17-d (West, WESTLAW through 1998 Reg. Sess.); N.J. STAT. ANN. § 9:2-7.1 (West, WESTLAW through L. 1999, c.61); N.M. STAT. ANN. §§ 40-9-1.1, 40-9-2 to 40-9-4 (West,

which grandparents have standing to petition a court for a judicial decree ordering visitation.[21]

The legislative history of the grandparent visitation statutes demonstrates that the laws were enacted to promote the welfare of children. Legislatures around the country conducted extensive hearings on the need for grandparent visitation

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WESTLAW through 1999 1st Reg. Sess.); N.Y. DOM. REL. LAW § 72 (West, WESTLAW through L. 1999); N.C. GEN. STAT. §§ 50-13.2, 50-13.2A, 50-13.5 (West, WESTLAW through 1998 Cumulative Supplement); N.D. CENT. CODE § 14-09-05.1 (West, WESTLAW through 1999 Reg. Sess.); OHIO REV. CODE ANN. §§ 3109.051, 3109.11, 3109.12 (West, WESTLAW through 1999 portion of 123rd G.A.); OKLA. STAT. ANN. tit. 10, §§ 5, 7505-6.5 (West, WESTLAW through 1998 1st Ex. Sess.); OR. REV. STAT. §§ 109.121, 109., 123, 109.332 (West, WESTLAW through 1997 Reg. Sess. and 1998 Cumulative Supp.); 23 PA. CONS. STAT. ANN. §§ 5311-5314 (West, WESTLAW through 1998 Reg. Sess.); R.I. GEN. LAWS § 15-5-24.3 (West, WESTLAW through 1998 Reg. Sess.); S.C. CODE ANN. § 20-7-420(33) (West, WESTLAW through 1998 Reg. Sess.); S.D. CODIFIED LAWS §§ 25-4-52, 25-4-54 (West, WESTLAW through 1999 Reg. Sess.); TENN. CODE ANN. §§ 36-6-305 to 36-6-307 (West, WESTLAW through 1998 Reg. Sess.); TEX. FAM. CODE ANN. §§ 153.433, 153.434 (West, WESTLAW through 1997 Reg. Sess.); UTAH CODE ANN. § 30-5-2 (West, WESTLAW through 1999 General Session); VT. STAT. ANN. tit. 15, §§ 1013-1016 (West, WESTLAW through 1997 Adj. Sess.); VA. CODE ANN. §§ 20-107.2, 20-124.2 to 20-124.4 (West, WESTLAW through 1999 Reg. Sess.); WASH. REV. CODE §§ 26.10.160, 26.09.240 (West, WESTLAW through 1998 Reg. Sess.); W. VA. CODE §§ 48-2B-1 to 48-2B-9 (West, WESTLAW through 1999 2nd Ex. Sess.); WIS. STAT. §§ 767.245, 880.155 (West, WESTLAW through 1999 Act 3); WYO. STAT. ANN. § 20-7-101 (West, WESTLAW through 1999 Reg. Sess.).

[21] Many states, *e.g.* Alabama, Mississippi, New York and Wyoming, confer visitation rights on grandparents alone. Other states, *e.g.* Arizona and Idaho, permit great-grandparents to petition for visitation rights as well. Some states, *e.g.* New Jersey and Rhode Island, permit both grandparents and siblings to petition for visitation. A few states, *e.g.* Connecticut and Washington, permit any person to petition for visitation rights.

legislation in which their state citizens, doctors, psychiatrists, judges, and state agencies testified. Below are some examples of the legislative histories of these statutes, including the legislative history of the grandparent visitation statute at issue in this case from the state of Washington.

The Washington Code has two visitation statutes which permit grandparents to petition for visitation rights, section 26.09.240, concerning divorce and legal separation, and section 26.10.160, concerning nonparental actions for child custody. Prior to 1996, both sections permitted any person to petition for visitation rights at any time and directed the courts to utilize the best interest of the child standard to determine whether to award visitation. *See* 1977 Wash. Laws Ch. 272 § 1; 1987 Wash. Laws Ch. 460 § 18; 1989 Wash. Laws Ch. 375 § 13. As the Supreme Court of Washington explained, *In re Custody of Smith*, 969 P.2d 21, 26 (Wash. 1998)(en banc), the legislature amended section 26.09.240 in 1996. 1996 Wash. Laws Ch. 177, § 1. Section 26.09.240 was changed to permit persons other than parents to petition for visitation only if the parents have filed for divorce or legal separation (though section 26.10.160 continues to permit a petition to be filed at any time). Also, the revised section 26.09.240 specifies numerous factors to be considered when determining the best interest of the child, including the relationship between the child and the grandparent, the relationship between the parents and the grandparent, the nature and reasons for the parents' objection to the grandparent's visitation, the effect of granting visitation on the relationship between the child and the child's parents, and any criminal history or history of physical, emotional, or sexual abuse or neglect by the grandparent. The revised statute contains the presumption that grandparent visitation is in the best interest of the child but requires consideration of evidence on this issue. The legislative history of the 1996 bill includes the following summary of the testimony in support of passage:

> Many grandparents have essentially raised their grandchildren because the parents are too young, are drug addicted, or otherwise incapable of raising their children. When those parents get divorced, the grandparents may be completely cut off from the grandchildren because of hostilities of one or both of the parents towards the grandparents. This bill will make it a little easier for grandparents to obtain court approval to continue to have contact or visitation with their grandchildren. The bill will not create an automatic right of grandparents to continue to have contact with their grandchildren.

Hearing on ESHB 1556 Before the House Comm. on Law & Justice, 1996 Reg. Sess. 2 (Wash. 1996)(Appendix B).

New York pioneered grandparent visitation legislation in 1966, passing a statute targeted to children whose parent or parents are deceased. A state Assemblyman explained the purpose of the bill:

> Since the grandparents are often the nearest responsible relatives other than the child's parents and frequently offer an additional stability in situations involving broken homes, especially where, as proposed herein one or more parents have died, the interests of justice may make their visitation desirable and even crucial. This bill retains discretion in the courts to grant or deny such visitation, and presents a worthwhile purpose.

N.Y.S. LEGISLATIVE ANNUAL 14 (1966)(memorandum of Assemblyman Noah Goldstein)(Appendix C). In 1975, the statute was broadened to apply to all situations in which "equity" warranted such visitation. A state senator explained that the change in the law was prompted by concern for the "welfare of children" in cases of child abuse and neglect and other situations where grandparent visitation "could be of invaluable consequence to the children and ultimately the society." N.Y.S. LEGISLATIVE ANNUAL 51 (1975) (memorandum of Senator Leon E. Giuffreda)(Appendix C).

In Connecticut, in 1978, the grandparent visitation statute was broadened to apply not only to divorce but also to cases in which the parents separate but file no legal action or the parents were never married. In the debate on the bill, a state Senator testified:

> I have seen so many situations where the child's rights are really so disregarded by the parents who are feuding that the only people that care about the child are the grandparents. This bill does not grant custodial rights, it merely grants visitation rights and I have seen cases where the parents are so embittered with each other that they deprive the grandparents of the rights to visit with the grandchildren. . . . I think [the bill] is a step in the right direction to make certain that the child's interests are the ones that are really protected the most.

21 S. PROC., Pt. 2, 1978 Sess. 33-34 (Conn. 1978)(statement of Senator Ballen)(Appendix D).

Michigan expanded its grandparent visitation statute in 1982 to apply not only when a parent is deceased but also when there is a custody dispute involving the grandchild. The legislative history includes the following arguments in favor of the bill:

> Many grandparents report that they have been cruelly prevented from maintaining contact with their grandchildren by the animosity of former children-in-law and their new spouses. In some cases such obstructive behavior is associated with the abuse of the children in question. A great deal of evidence exists that a healthy relationship with a grandparent is of great emotional importance to a child and that it is in the interests of all concerned to preserve such a relationship when it exists. It is nevertheless true that parents have a right and a duty to supervise the upbringing of their children and

> that not all grandparents constitute a healthy influence on their grandchildren. The mediation of a court, ensuring the protection of the best interests of the child, should provide a way of establishing the proper balance of interests.

H. LEGISLATIVE ANALYSIS SECTION FOR S. 439 & 440 (Mich. 1982)(Appendix E).

Prior to 1984, a petition for grandparent visitation could be filed in Kansas only in cases involving either a divorce or deceased parent. In 1984, Kansas broadened its grandparent visitation statute to apply to intact families, in which both parents are alive and married to each other. The House Judiciary Committee received written testimony from numerous psychiatrists supporting the change in the law. One psychiatrist wrote:

> In summary, child-grandparent relationships have important psychological and social contributions to make toward the healthy development of children. Unfortunately, parents sometimes do not recognize this truth, and in pursuit of their private wars, sacrifice the children's best interest for their own goals. One of the newly emerging situations in our current social complexity is the gulf between grown children or semi-grown children (teenagers) and their parents precipitated by their participation in the drug scene. This clash of values and life styles frequently includes depriving grandparents of contacts with the grandchildren.

Hearing on S. 615 Before the House Comm. on Judiciary, 1984 Sess. (Kan. 1984)(letter from Herbert C. Modlin, M.D.)(Appendix F).

Prior to 1993, grandparents in California could only obtain visitation rights with grandchildren in the context of a legal proceeding for divorce or legal separation of the parents.

California revised its code in 1993 to permit grandparents to file an independent action for visitation in any proceeding pertaining to the custody of the child, including actions for paternity, actions under the state's Domestic Violence Prevention Act, guardianship actions, and juvenile dependency actions. The California Senate Committee Report states:

> In California, nearly 500,000 [children] live with grandparents. Supporters of grandparents visitation warn that with a drug epidemic, poverty and rising single parenthood, these numbers will double in the next 10 years. Most of these grandparents are raising their grandchildren without benefit of custody or legal guardianship meaning the children can be and often are taken from them without notice and without recourse to visitation or contact. The grandchildren may be totally cut off from the grandparents whom they have learned to love and to trust for support and guidance.
>
> The grandparents are denied visitation with their grandchildren usually because of very petty and often trivial disputes between the grandparents and the parents.

Comm. Rep. on S. 306, 1993-94 Reg. Sess. (Cal. 1993), available in WESTLAW, CCA-Old (Appendix G).

The Nevada State Legislature revised its grandparent visitation legislation in 1999 to apply not only to children whose parents are divorced or deceased but also to children born out of wedlock. The 1999 revisions specified additional factors to be considered by the courts when reviewing a petition for grandparent visitation, including whether the grandparent can serve as a role model for the child. The Nevada Senate Committee on Judiciary heard testimony in support of the proposed legislation from a family court district judge.

> [Judge Steel] recalled instances of children who may have lived with "grandmother" for 7 or 8

> years, and the grandmother was the day-care provider. When the custodial parent decided to move on with his or her life, he or she just walked away and did not give visitation rights. Judge Steel asserted the person who is hurt as much as the grandparent is the grandchild. She said there is a fine line the judge often cannot cross over if it will cause a conflict between the parent and grandparent. Additionally, Judge Steel stated the judges must decide what constitutes a "meaningful relationship" in each and every case. She mentioned in this day and age, children are having children, and they are often angry with their parents and taking their children away from their grandparents. Judge Steel referred to the provision in the bill regarding the grandparent being a good role model. She favors that provision and noted it would help judges in placing children, when they know two immature people are raising them, to know they could perhaps get a status check once a month from the grandparents to ensure the child is still thriving in their care and custody.

Hearing on Assembly Bill 436 Before the Senate Comm. on Judiciary, 70th Legis. Sess. 4 (Nev. 1999)(minutes of statement of Judge Cynthia Steel)(Appendix H).

Similarly, in Montana, the legislature was concerned about out-of-wedlock births and the continuation of grandparent/grandchild relationships after the child lived with the grandparent for a period of time. In 1983, Montana expanded its grandparent visitation statute, removing the limitation that the statute applied only when a parent was deceased. The bill's sponsor noted:

> Previously we as a society have just looked at what the parents want and have not considered the child's needs and views. . . . The unwed mother might raise her child in the grandparents

> home. A grandparent-grandchild relationship has then been established. If the unwed mother decides to leave the home and take the child, the grandparent should be able to petition the court for visitation rights.

Hearing on H. 376 Before the House Comm. on Judiciary, 48th Legis. Sess. 3 (Mont. 1983)(minutes of statement of Representative Kathleen McBride)(Appendix I).

In 1986, Nebraska was the last of the 50 states to adopt a grandparent visitation statute (though many states revised their statutes after that date). The Nebraska Senate engaged in extensive debate on the bill, spanning from March 1985 to March 1986. The bill's author explained the need for the legislation when it was first introduced:

> The rapid social changes affecting our families over several decades threaten the generation bond as most of us have known it. Today's increased mobility and high divorce rates, separations and family abuse problems have tended to separate millions of children from relatives of an older generation who have traditionally served as the emotional buffers between generations as well as custodians of family history and culture. . . .
>
> [I]t is not the grandparent's proprietary interest in grandchildren that justifies an award of custody or visitation. It is the need of the grandchildren to know and associate with concerned grandparents. The pleasure which grandparents may derive from such association is merely a bonus, although a very precious one. Recognizing [sic] that only the child's welfare, including the right to maintain that meaningful association, should be the controlling criteria.

Hearing on LB 105 Before the Senate, Eighty-Ninth Legis., 1st Sess. 87-90 (Neb. 1985)(statement of Senator Lowell Johnson)(Appendix J).

II. AFFIRMANCE OF THE DECISION BELOW WOULD INVALIDATE VIRTUALLY ALL GRANDPARENT VISITATION STATUTES NATIONWIDE

A. While State Visitation Statutes Differ, They All Utilize the Best Interest of the Child Standard.

No two state laws regarding grandparent visitation are exactly the same. The legislatures of each of the fifty states crafted their own individual responses to the social concerns facing their constituents. Many legislatures considered the issue of grandparent legislation numerous times, as statutes were expanded or narrowed. A comparison of the current grandparent visitation laws reveals many similarities and differences in these statutes. *See* attached chart, Comparison of Grandparent Visitation Statutes Nationwide (Appendix A).[22]

Twenty states do not permit grandparents to petition for visitation with grandchildren when the children's parents are married and both parents oppose such visitation. These states specify limited circumstances in which a grandparent may file a petition for visitation, such as a divorce or custody proceeding, the death of a parent, or a child born out-of-wedlock.[23] The other thirty states, including Washington, permit grandparents to petition for visitation regardless of the parent's marital status, even when the parents oppose

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[22] This chart is based on *amici's* analysis of the statutes listed *supra* in note 20.

[23] These states are Arizona, Arkansas, California, Colorado, Delaware, Georgia, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, South Carolina, Tennessee, Vermont, and Virginia.

grandparent visitation.[24] Of these states, four permit the grandparents to petition for visitation when the parents are married only if the child previously resided with the grandparents for a minimum period of three to twelve months.[25] Another eight of these states permit a petition when the parents are married only if the grandparents have been denied visitation with the grandchild.[26]

Twenty-seven states require courts to take into consideration whether the grandparent has already established a substantial relationship with the grandchild in determining whether to award visitation in an individual case.[27] Eighteen states require the courts to consider the effect of court-ordered grandparent visitation on the child's relationship with the

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[24] These states are Alabama, Alaska, Connecticut, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. Many of these states have additional provisions which expressly allow grandparents to petition for visitation when parents are deceased, divorced, separated, or unmarried.

[25] These states are Minnesota, New Mexico, Pennsylvania, and Texas.

[26] These states are Alabama, Florida, Iowa, Mississippi, Missouri, Oregon, Rhode Island, and Utah.

[27] These states are Alaska, Arizona, California, Florida, Indiana, Iowa, Kansas, Maine, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Washington, West Virginia, and Wisconsin.

parent.[28] Thirty-one states explicitly permit grandparents to petition for visitation following adoption by a step-parent.[29]

Despite these differences, all the statutes share one important characteristics: the requirement that the trial court determines whether grandparent visitation is in the individual child's best interest. While states differ in their definitions of factors to be considered in determining the best interest of the child, they all concur that the standard of the child's best interest is the appropriate basis for deciding visitation.

B. Only One State Statute Now Requires a Finding of Harm as a Prerequisite to Grandparent Visitation.

The Supreme Court of Washington held that, in order to comply with the United States Constitution's guarantee of privacy, a grandparent visitation statute must require the grandparent to prove that the absence of visitation will harm the child. *In re Custody of Smith*, 969 P.2d at 30. Following this decision, the Washington Senate and House each passed bills to modify the Washington visitation statutes to comply with the decision. However, the two houses could not agree on the

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[28] These states are Alabama, California, Florida, Maine, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Oklahoma, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wyoming. The wording of these provisions varies. For example, Oklahoma requires the court to consider the willingness of the grandparent to encourage a close relationship between the child and the parents, while South Carolina requires the court to find that grandparent visitation would not interfere with the relationship between the child and the parents.

[29] These states are Alabama, Alaska, Arizona, California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, West Virginia, and Wyoming.

language of the revisions, and therefore, no bill was passed.[30] Currently, the statutes remain as written in 1996, relying upon the best interest of the child standard and not requiring a finding of harm.

In addition to Washington, forty-eight other state grandparent visitation statutes rely solely on the best interest of the child standard and do not require any showing that visitation will prevent imminent harm.[31] Therefore, the Court's decision in this case will have an impact on grandparents' right to seek court ordered visitation not only in Washington but also nationwide.

The Georgia visitation statute is the only state statute requiring a court to find, as a prerequisite to an order of grandparent visitation, that the child will suffer harm from the absence of visitation. The statute requires the court to find both that the visitation is in the best interest of the child and that the "health or welfare of the child would be harmed unless such visitation is granted." GA. CODE ANN. § 19-7-3 (c) (West, WESTLAW through 1999 General Assembly). The provision requiring a showing of harm was added to the statute after the Supreme Court of Georgia held that the Georgia grandparent visitation statute violated the United States Constitution. *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga.), *cert. denied*, 516 U.S. 942 (1995). The Supreme Court of Georgia is the only state supreme court other than the Supreme Court of Washington to reach the conclusion that a grandparent visitation statute violates the United States Constitution.

The Supreme Court of Virginia has interpreted its state statute to require a finding that the denial of grandparent visitation would be detrimental to the child's welfare, when this

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[30] *See* Washington State Legislature, History of HB 1173 (last modified April 26, 1999) <http://www.leg.wa.gov/pub/billinfo/1999-00/house/1750-1774/1773_history.txt>.

[31] *See* statutes cited *supra* note 20, and *amici's* chart analyzing the statutes, Appendix A.

statute was applied to the married parents of the children. As a result, the court concluded that the statute did not violate the United States Constitution. *Williams v. Williams*, 501 S.E.2d 417 (Va. 1998). Subsequently, the Court of Appeals of Virginia, held that the requirement of a showing of harm does not apply when the parents are divorced, only one parent objects to the grandparent's visitation, and the non-custodial parent requests the grandparent's visitation. *Dotson v. Hylton*, 513 S.E.2d 901 (Va. Ct. App.1999). Thus, Virginia does not require proof of harm, except when the statute is applied to married parents.[32]

Two states have held that grandparent visitation statutes violate their state constitutions. The Supreme Court of Tennessee held that the application of the grandparent visitation statute to a married couple violated the Tennessee constitution. *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993). The Tennessee legislature subsequently changed the statute to apply only in instances of parental death or divorce. The new statute utilizes a best interest of the child standard and does not require a showing of harm. TENN. CODE ANN. §§ 36-6-305 to 36-6-307 (West, WESTLAW through 1998 Reg. Sess.). The Supreme Court of Florida held that an order of grandparent visitation violates the Florida constitution, both in the case of married parents and when one of the parents is deceased, unless there is a finding that the child will suffer harm. *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998); *Beagle v. Beagle*, 678 So. 2d 1271 (Fla. 1996). The Florida legislature has not revised its statute which was found to violate the Florida constitution.

Numerous state courts have upheld the constitutionality of grandparent visitation statutes that utilize a best interest of

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[32] The Supreme Court of Connecticut expressed concerned about whether its grandparent visitation statute comported with the United States Constitution. The Connecticut court construed the Connecticut visitation statute as applicable to married parents only if the "child's family life had been disrupted," including if there was an allegation of abuse or neglect or the child had lived with the grandparents. *Castagno v. Wholean*, 684 A.2d 1181 (Conn. 1996).

the child standard and do not require a showing that the child will suffer harm. *Cockrell v. Sittason*, 500 So. 2d 1119 (Ala. Civ. App. 1986); *Graville v. Dodge*, 985 P.2d 604 (Ariz. App.), *review denied* (1999); *West v. West*, 689 N.E.2d 1215 (Ill. App. Ct.. 1998); *Sightes v. Barker*, 684 N.E.2d 224 (Ind. Ct. App. 1997); *Spradling v. Harris*, 778 P.2d 365 (Kan. Ct. App. 1989); *King v. King*, 828 S.W.2d 630 (Ky.), *cert. denied*, 506 U.S. 941 (1992); *Martin v. Coop.*, 693 So.2d 912 (Miss. 1997); *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993)(enbanc); *Roberts v. Ward*, 493 A.2d 478 (N.H. 1985); *R.T. v. J.E.*, 650 A.2d 13 (N.J. Super. Ct. Ch. Div. 1994); *Ridenour v. Ridenour*, 901 P.2d 770 (N. Mex. Ct. App. 1995); *People ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049 (N.Y. 1981); *Hollingsworth v. Hollingsworth*, 516 N.E.2d 1250 (Ohio Ct. App. 1986); *Deweese v. Crawford*, 520 S.W. 2d 522 (Tex. Civ. App. 1975); *Campbell v. Campbell*, 896 P.2d 635 (Utah Ct. App. 1995); *Michael v. Hertzler*, 900 P.2d 1144 (Wyo. 1995). These cases conclude that while parents have a right to privacy, the state's role as parens patriae enables the state to order grandparent visitation where such visitation would be in the child's best interest. For instance, the Supreme Court of Kentucky stated:

> [T]he General Assembly determined that, in modern day society, it was essential that some semblance of family and generational contact be preserved. If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. That grandparents and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love. The grandparent can be invigorated by exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life. These considerations by the state do not go too far in intruding into the fundamental rights of the parents. Thus, we find that [the Kentucky grandparent visitation statute] is constitutional.

> Central to our finding is the protection afforded the child, the parents and the grandparents. If the statute gave the grandparents the unrestricted right of visitation, there would be much less reluctance to declare it unconstitutional. But visitation cannot be granted until an action is filed in Circuit Court, a hearing conducted before a judge or commissioner, and findings of fact and conclusions of law entered finding that the best interests of the child will be served by granting or denying visitation. Fortunately, it is not a common occurrence for this statute to be called into play, but when it is, the parties are afforded ample protection to preclude either injustice or an unwarranted intrusion into the fundamental liberty of the parents and child.

King v. King, 828 S.W.2d at 632.

While it is certainly in the best interest of children not to suffer harm, the best interest standard is much broader than a focus on harm. For instance, Alaska requires a trial court reviewing a petition for grandparent visitation to "consider whether there is a history of child abuse or domestic violence" by the parent. ALASKA STAT. § 25.20.065 (Deering, LEXIS through 1998 2nd Spec. Sess.). This is a very different inquiry than looking for current bruises and proof that occasional grandparent visitation will prevent the bruises. The best interest standard provides a basis for grandparents to maintain contact with children who have previously been abused by their parents and are currently living with their parents. As demonstrated by the legislative history of the grandparent visitation statutes, the states determined that the best interest standard was the appropriate means of protecting children.

Moreover, the best interest standard permits courts to consider the importance of a substantial prior relationship between grandparents and grandchildren, for instance when the child resided with the grandparents for a minimum of twelve months. *See* MINN. STAT. ANN. § 257.022 (West, WESTLAW

through 1998 1st Spec. Sess.); 23 PA. CONS. STAT. ANN. §§ 5313 (West, WESTLAW through 1998 Reg. Sess.). While it may be very difficult to prove that a child will suffer psychological devastation from the destruction of the grandparent/grandchild relationship in such circumstances, it is more readily ascertainable that the best interest of the child will be served by the continuation of the grandparent/grandchild relationship. The states have determined that a best interest standard serves society's interest in children's well being.

There are forty-nine state statutes permitting courts to order grandparent visitation that is in the best interest of the child without requiring courts to find that the individual child will suffer harm from the absence of the petitioning grandparent. If this Court affirms the holding of the Supreme Court of Washington that the United States Constitution requires a finding of harm as a prerequisite to an order of grandparent visitation, then not only the Washington statute but also forty-eight other grandparent visitation statutes will be rendered invalid. In contrast, a reversal of the decision of the Supreme Court of Washington would permit all the states (including Georgia) to grant grandparents the right to visit with their grandchild when such visitation is in the best interest of the child, even if the grandparents cannot prove that the child is in imminent danger.

III. GRANDPARENT VISITATION LEGISLATION TO PROMOTE THE CHILD'S BEST INTEREST IS WELL WITHIN THE AMBIT OF THE STATES' POWERS UNDER THE UNITED STATES CONSTITUTION

All fifty states have determined that it is in the public interest to permit trial courts to consider whether grandparents should have visitation rights in individual cases.

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress . . . or the States legislating concerning local affairs.

Berman v. Parker, 348 U.S. 26, 32 (1954). In determining whether grandparent visitation statutes offend the Constitution, the Court should be cognizant that all fifty states have passed grandparent visitation legislation which relies upon the best interest of the child standard.

> The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Schall v. Martin, 467 U.S. 253, 268 (1984)(quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) and *Leland v. Oregon*, 343 U.S. 790, 798 (1952)).

The legislative history of the grandparent visitation statutes demonstrates that the states were balancing the liberty interests of parents against the needs of children. Indeed, eighteen states included an explicit provision in their statutes requiring courts to consider the effect of court-ordered grandparent visitation on the child's relationship with the parent.[33] Our Constitution empowers the legislatures, as much as the courts, to protect the liberties of citizens.

> Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare

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[33] *See supra* note 28.

> of the people in quite as great a degree as the courts.

Missouri, K. & T.R. Co. v. May, 194 U.S. 267, 270 (1904).

The Supreme Court of Washington held that the state's interest in the best interest of children is not sufficiently "compelling" to overrule parents' fundamental constitutional right to raise their children. *In re Custody of Smith*, 969 P.2d at 29-31. However, the Washington court failed to recognize that the state's power to protect the public welfare is quite broad and easily includes the protection of the best interests of children. "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary." *Berman v. Parker*, 348 U.S. at 33.

This Court has recognized the extensive power of states to enact statutes which are designed to promote the welfare of children. In *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 167-68 (1944), the Court stated:

> [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare. . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection.

Grandparent visitation statutes seek to promote the growth of young people into healthy citizens in a time of changing family structures, including the decrease in two parent households and the increase in grandparents caring for their grandchildren with no parent in the home. These statutes are designed to provide stable, loving psychological relationships for children whose parent or parents are absent, abusive and/or addicted to drugs.

The Constitution does not prohibit trial courts from awarding grandparent visitation when such visitation is in the child's best interest. As the dissenting judges in the Supreme Court of Washington argued, an award of visitation is a minor infringement on parental rights, far less intrusive than a change in custody, an out of home residential placement of a child or termination of parental rights. *In re Custody of Smith*, 969 P.2d at 35-36 (Talmadge, J., dissenting). The privacy cases relied upon by the Supreme Court of Washington are not controlling, because they involve substantial infringements of parents' rights. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972)(grave endangerment of destruction of free exercise of parents' religious beliefs); *Stanley v. Illinois*, 405 U.S. 645 (1982)(termination of parental rights based on insufficient evidentiary standard); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925)(unreasonable interference with liberty of parents to direct the upbringing and education of their children where parents wanted to send their children to established religious or military schools). An order for grandparent visitation, when it is in the best interest of the children (as found by the trial court below[34]), is a minor infringement of parents' autonomy which is permissible under the states' parens patriae power and does not violate the United States Constitution.

Indeed, in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977), this Court held that the constitutional protection of the "sanctity of the family" extends to the relationship between a grandmother and her two grandsons. The Court rejected the argument that the "protection of family rights" is limited to the "boundary of the nuclear family."

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents

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[34] *See* Findings of Fact and Conclusions of Law Dated and Filed January 3, 1996, Superior Court of Washington for Skagit County, Appendix C to the Petition for a Writ of Certiorari, pages 72a-75a.

> sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.

Id. at 504.

The Supreme Court of Washington took issue with the best interest standard as the means for determining whether grandparent visitation is "justified." *In re Custody of Smith*, 969 P.2d at 30-31. The court stated that the legislation should "require the petitioner to establish that he or she has a substantial relationship with the child." *Id.*

However, it is up to the legislature, not the courts, to select the means by which the state will attain the goal of promoting the public welfare. *Berman v. Parker*, 348 U.S. at 33. "Legislative bodies have broad scope to experiment," *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1953), especially when confronting difficult societal problems, such as child abuse and parental drug addiction.

> State intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society. For all of our experience in this area, we have found no fully satisfactory solutions to the painful problem of child abuse and neglect. We have found, however, that leaving the State free to experiment with various remedies has produced novel approaches and promising progress.

Santosky v. Kramer, 455 U.S. 745, 771 (1982)(Rehnquist, J., dissenting). All fifty states have determined that grandparent visitation is a valuable remedy to address the problem of child abuse and neglect. No longer experimental, grandparent visitation statutes based on the best interest of the child standard have promoted the welfare of children in all fifty states for more than a decade.

Moreover, since the protection of the welfare of children through grandparent visitation statutes is a rational

means of addressing societal problems such as child abuse, single parent households, teenage parents, and drug addiction, it is irrelevant whether each state legislature explicitly targeted each of these problems. It is sufficient that a valid purpose for these statutes has been identified. This Court has held that, in confronting a constitutional challenge to a statute, courts may "never require a legislature to articulate its reasons for enacting a statute," and therefore "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged [statute] actually motivated the legislature." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

CONCLUSION

For the reasons stated, *amici* urge the Court to reverse the decision below and to hold that the Washington grandparent visitation statutes which utilize the best interest of the child standard do not violate the United States Constitution.

Respectfully Submitted,

Rochelle Bobroff*
Bruce Vignery
AARP Foundation Litigation

Michael Schuster
AARP
601 E Street, NW
Washington, DC 20049
(202) 434-2060

Attorneys for *Amici Curiae*
AARP and Generations United
*Counsel of Record

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